No. 88-282

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM ALTER, UNITY VENTURES, and LASALLE NATIONAL BANK,
Petitioners,

v.

EDWIN M. SCHROEDER, NORMAN C. GEARY, GEORGE BELL, VILLAGE OF GRAYSLAKE, and COUNTY OF LAKE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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1. Respondents' lengthy recital of their jury arguments is unnecessary, because the only relevant facts are those few and simple ones relied on by the Court of Appeals for its legal ruling. Holding a matter of law that petitioner had not satisfied the ripeness requirements of *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985), the Court of Appeals nevertheless acknowledged:

—Petitioner "submitted to the Lake County Public Works Department two plans for the connection," A. 5a, which were "approved," *id.*, until the Grayslake Trustees issued their "rebuff." A. 6a; see also A. 43a.

—In the Court of Appeals' words, "When Alter met with Mayor Schroeder and others October 31, 1978, Schroeder, *speaking with the knowledge and approval of the Board of Trustees, told him that Grayslake would not consent at that time* to the Unity property connecting to the Northeast Interceptor." A. 10a (emphasis supplied). It was undisputed that the mayor at the same time announced "there is no use talking about density or anything else," and that "he didn't know at what time" Grayslake would "even consider" petitioner's proposal. T. 753.[1]

—After Grayslake's refusal, his village for petitioner "appealed Grayslake's veto of Alter's requested sewage connection to the Lake County Board," which took no action in spite of its counsel's opinion supporting petitioner. A. 5a-6a.

—Later, after petitioner failed to assist them in blocking another developer, "the Grayslake trustees on February 2, 1981, unanimously rescinded their earlier resolution to consider allowing the Unity Property to connect to the Northeast Interceptor," A. 7a,[2] and further filed objections to block petitioner from building a separate treatment plant. A 6a-7a.

Only then did petitioner finally sue.

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[1] The District Court found that petitioner suffered "the denial of a sewer hook-up," A. 93a, because "[i]n the present case, there was a refusal by Grayslake," A. 84a, that "any more formal application would have been futile," A. 25a-40a, and that under Illinois procedure "there is no requirement of a particular formalized application process." A. 25a. Respondents argue in this Court that petitioner should have gone to the Illinois Environmental Protection Agency, Br. Op. 4; in the District Court they conceded that such an application would not have been considered unless the county joined it. A. 26a.

[2] It was undisputed that adequate capacity to accommodate petitioner was available at all times, T. 365, and that Grayslake consented to connections by other developers who had agreed to annexation by Grayslake, T. 304-08.

The Court of Appeals nevertheless held as a matter of law, based on its reading of *Williamson County*, that petitioner should have gone back and after three years "should have sought formal approval of his request for a sewer connection from the Grayslake Board of Trustees at a regular meeting," A. 12a, and that "thus," A. 10a, his claims that he had been denied equal protection, procedural due process and substantive due process should not have been heard.

The simple question is whether the Court of Appeals' legal ruling was right. First, does *Williamson County* apply to a non-taking § 1983 case at all? Second, after a § 1983 plaintiff has been authoritatively informed that he is turned down, appeals unsuccessfully, is blocked by other improper actions while other applicants are approved, and later is again informed by a formal resolution that he will not be considered, has he not finally done enough to file a § 1983 civil rights claim in federal court?

2. Respondents say nothing at all about—in fact, they do not even cite—*Felder* v. *Casey*, 108 S. Ct. 2302 (1988), discussed at length at Pet. Cert. 15, 22, 23. *Felder* held that § 1983 does not "force[] injured persons to seek satisfaction from those alleged to have caused the injury in the first place," or "to seek redress from the very state officials whose hostility to those rights precipitated those injuries." 108 S. Ct. at 2311, 2312.

3. Respondents say nothing at all about petitioner's § 1983 claim that he was denied *procedural* due process. The Seventh Circuit, lacking the benefit of this Court's subsequent decision in *Felder* v. *Casey*, *supra*, simply held that the "procedural due process claim is not ripe" and erroneously interpreted § 1983 and *Williamson County* as remitting petitioner to the tender mercies of the very officials whose persistent devices he was complaining of. A. 13a. The Ninth Circuit, by contrast, has said it doubts that *Williamson County* applies to pro-

cedural due process claims at all. *Herrington* v. *City of Sonoma*, 834 F.2d 1488, 1495 (9th Cir. 1987).

4. The Court of Appeals itself here recognized that whether *Williamson County* applies here is an open question, not yet ruled upon by this Court. A. 8a-9a. It resolved that question by holding that although "[t]he Supreme Court's recent discussion of ripeness has been in the context of regulatory taking claims," nevertheless "the ripeness analysis used in those cases applies as well to equal protection and due process claims." *Id.*

Several Circuits now have looked at that same question, and come to differing conclusions. The Eighth Circuit in at least two cases has held "taking" claims "not yet ripe" under *Williamson County* while at the same time holding that parallel § 1983 due process claims were ripe. *Mitchell* v. *Mills County*, 847 F.2d 486, 488 (8th Cir. 1988); *Littlefield* v. *City of Afton*, 785 F.2d 596 (8th Cir. 1986). The Ninth Circuit likewise, again contrary to the Seventh here, holds that "*Williamson* does not require us to apply the identical ripeness standard for takings to . . . substantive due process, procedural due process and equal protection claims," and that such differing claims "are not fungible." *Herrington* v. *City of Sonoma*, 834 F.2d 1488, 1499, 1498 n.7 (9th Cir. 1987). On the other hand, as respondents correctly point out, the Eleventh Circuit, like the Seventh here, has concluded that in *Williamson County* "the Supreme Court implicitly ruled that the same ripeness test must be applied to both [due process and taking] claims." *Corn* v. *City of Lauderdale Lakes*, 816 F.2d 1514, 1516 n.2 (11th Cir. 1987).

5. Because this was a § 1983 action complaining of a whole course of conduct to deny Fourteenth Amendment rights, extending over several years, respondents' discussion of cases about statutes challenged "on their face" or "as applied" is quite irrelevant. Petitioner here was not

challenging the facial validity of a statute or regulation; the District Court found that "the acts complained of have already occurred." A. 26a, 84a, 93a. Nor is this a case where, as respondents incorrectly say, "Petitioner had one meeting with the Mayor of Grayslake and, on that basis, alleges the denial of sewer service." Br. Op. 4. As the complaint alleged and as the jury found, at issue were what the District Court called a whole "series of wrongful acts" by respondents, A. 43a, cumulating over a period of three years, designed unlawfully to block him at every turn, even from building his own treatment plant. See Pet. Cert. 10-11. To hold that such a series of concerted, completed acts could not state a ripe tort claim under § 1983 is to take away much of the force of that statute. The Seventh Circuit here is in clear conflict with, for example, *Bello* v. *Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988), *pet'n for cert. pending*, No. 87-1968, in which the Third Circuit held that a § 1983 claim was ripe when it alleged "that certain council members, acting in their capacity as officers of the municipality improperly interfered with the process." See Pet. Cert. 17.

6. Respondents misstate the holdings of recent cases in other Circuits. For just two examples:

—In *Sullivan* v. *Town of Salem*, 805 F.2d 81 (2d Cir. 1986), the Second Circuit saw no ripeness obstacle to a § 1983 due process claim of improper denial of an occupancy certificate, even though there was less official action than here—in that case, merely a negative statement by the first selectman and a building official—and the plaintiff chose to forgo a specifically prescribed legal recourse to a town meeting. See Pet. Cert. 20. Respondents' irrelevant quotation from a different section of that opinion, Br. Op. 25, was followed by the court's observation that "Sullivan's certificate of occupancy claim, however, rests on a different footing . . . ." 805 F.2d at 84.

—In *Neiderhiser* v. *Borough of Berwick*, 840 F.2d 213 (3d Cir. 1988), *pet'n for cert. pending*, No. 87-1969,

which respondents are unable to distinguish in any coherent way at all, see Br. Op. 25, the Third Circuit held a § 1983 due process claim ripe even though an initial denial of a zoning exemption was later reconsidered and actually *granted*. There is no way that that § 1983 claim can be heard and this one not.

7. Respondents also are unable to justify or explain the Seventh Circuit's novel ruling that Sherman Act claims can be unripe even after acts in restraint of trade have been committed. When they say that "ripeness was never raised nor even mentioned" in *Patrick* v. *Burget*, 108 S. Ct. 1658 (1988), see Br. Op. 28, they are correct, but they really underscore the point. If *Williamson County*'s ripeness test for taking cases applied to the Sherman Act, then *Patrick* v. *Burget* could not have been decided as it was. See Pet. Cert. 26-27. Ripeness was not considered to be an obstacle in *Patrick*, even though the plaintiff there had not sought relief through the peer-review process at all.[3]

* * * *

Petitioner believes that this Court when it sensibly decided *Williamson County*—in the peculiar context of zoning procedures and "taking" claims—did not mean to block ordinary § 1983 suits alleging a course of tortious actions by state officials to deny procedural due process, substantive due process, and equal protection of the laws. The full meaning and implications of *Williamson County* have been called "a puzzle," creating "difficulty" for the lower courts.[4] *Williamson County*'s meaning outside the

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[3] Respondents also do not discuss or deny the conflict on this point with Eighth and Ninth Circuit cases cited at Pet. Cert. 27. Their argument, Br. Op. 29, that state-action immunity should apply, goes to merits; although petitioner could demonstrate at length that the Court of Appeals erred in its dictum on that point, that issue is not before this Court because the holding below relied on ripeness.

[4] *HMK Corp.* v. *County of Chesterfield*, 616 F. Supp. 667, 671 (E.D. Va. 1985); *Kaiser Dev. Co.* v. *City and County of Honolulu*, 649 F. Supp. 926, 941 n.18 (D. Haw. 1986).

"taking" context, if it has one, is a recurring question that will have to be addressed, and better sooner than later. The present record demonstrates probably the most extreme interpretation of that decision to date. The Seventh Circuit put the inevitable issue plainly and simply.

CONCLUSION

For the reasons stated here and in the petition, certiorari should be granted and the judgment vacated or the case set for argument.

Respectfully submitted,

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